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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION,
Petitioner,

v.

WALTER J. HICKEL, Secretary of the Interior, et al.,
Respondents.

BRIEF FOR THE STATE OF COLORADO, AMICUS CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

Statement of Interest

The State of Colorado through its Game, Fish, and Parks Division herein supports the New Mexico State Game Commission in its petition for writ of certiorari and presents its views concerning the serious and important issues presented to the Court. The question which most vitally concerns the people of the State of Colorado is whether the paramount right and authority to conserve, control, and manage resident species of wildlife for public use and benefit lies with the several States in accordance

with applicable state law or whether the United States in the exercise of a proprietary interest in land within a state has authority to exercise dominion over any species of wildlife on such land, contrary to state law?

The purpose of this brief is to inform the Court how the State of Colorado has viewed its historical role with respect to the ownership, management, and control of resident species of wildlife, and make explicit to the Court that failure to review and determine the issues in this cause could have a catastrophic impact upon wildlife management, and more importantly, game, fish, and parks development in the State of Colorado. No attempt is made herein to reiterate the legal argument set forth in Petitioner's brief.

II.

Historical Doctrine – State Ownership And Management of Game and Fish

62-1-1, CRS 1963, enacted in 1899 by the General Assembly of the State of Colorado, acknowledges the common law doctrine of state ownership of game and fish by providing:

> "All game and fish within this state not held by private ownership legally acquired, . . . are hereby declared to be the property of the state, and no right, title, interest or property therein can be acquired or transferred, or possession thereof had or maintained except as expressly provided in this chapter."

In *Maitland v. Peopel,* 93 Colo. 59, 60, 195 P. 2d 116, 117 (1933) the state Supreme Court affirmed and explained the statutory declaration by stating:

"... The power of the state to make regulations tending to conserve the game within its jurisdiction is based largely on the circumstance that 'the property right to the wild game within its borders is vested in the people of the state in their *sovereign* capacity; and, as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right but it is the duty of the state to take such steps as shall preserve the game . . .'"

(Emphasis supplied.)

Recognizing the importance of proper regulation and management of game and fish, the State of Colorado created by statute (62-2-1, CRS 1963) a Game, Fish, and Parks Department to be placed under the jurisdiction of the Game, Fish, and Parks Commission. (Now the Game, Fish, and Parks Division, which includes the Commission, placed under the jurisdiction of the Department of Natural Resources). The state legislature, in 62-2-16, CRS 1963, charged the commission, in addition to other duties, with the following responsibilities:

"For the purpose of providing an adequate and flexible system of protection, propagation, increase, control, and conservation of game, ... the commission is hereby authorized and directed to determine under what circumstances, when, and in what localities, by what means, and in what amounts and numbers, the same may be taken or killed ..., and thereupon by appropriate rules and regulations:

"Shall fix seasons and bag limits, shorten, extend or close seasons on any species of game ...

"Establish and close to hunting, trapping or fishing, game, bird, and fish refuges, and to close or open any

lakes or streams or parts thereof to fishing, to regulate and prescribe the means by which game and fish may be taken as in its judgment may be deemed best to perpetuate, increase, restore, or control any kind of game and fish, and assure a constant and adequate supply thereof..."

The state legislature has also conferred upon the commission the authority to destroy wild animals causing depredations, where, in 62-2-28, CRS 1963, it is stated:

"When in the judgment of the game, fish, and parks commission of the state of Colorado, it is deemed necessary to cause the destruction of any wild animals, whether protected by law or not, because of the fact that such animals have become detrimental to life, health, crops, timber, property or cultivation of lands, it is hereby authorized to kill, cause to be killed or grant permission to kill such animals under such rules and regulations as said commission deems necessary...."

Pursuant to the authority granted by the above statute, the department has gone on record as being capable of and willing to reduce herds on federal lands wherein depredations are occurring. In 1962 the department requsted permission from the National Park Service to conduct a controlled hunt in Rocky Mountain National Park for the purpose of reducing game herds to a manageable level. The National Park Service rejected the proposal.

Pursuant to 62-3-18, CRS 1963, the commission is also authorized to issue scientific collection permits.

As is evident from the authorities cited herein, the General Assembly of the State of Colorado and the Su-

preme Court of the State of Colorado have long considered this state, in the exercise of its sovereign authority, to have the paramount right to conserve and manage the resident species of wildlife acknowledged at common law to be owned by the State of Colorado in its sovereign capacity.

Congress and the Federal Government have long acquiesced to the States' historic right to exercise exclusive control over resident species of wildlife. Congress has not enacted any legislation relative to this subject matter which conflicts with state statutes or with rules and regulations prescribed by state conservation agencies. For many years, including the present, the Federal Government has actively solicited the various States to exercise their police power with respect to regulating, managing, and controlling resident species of wildlife situated on all lands within said states. The States have accepted this responsibility and are presently doing a professional job of management; in so doing, forage and herd quality have been substantially improved on federal land. The silence of Congress with respect to this subject matter is self-evident. Can the Federal Government now stand behind sophistry and specious legal reasoning and say that it has always had the authority to manage wildlife situated on federal lands, regardless of state law, and that it may exercise said authority piecemeal, when and where it deems provident. This ambivalent policy cannot be tolerated by the States. If the Federal Government wishes to manifest supremacy in the area of wildlife management, then let it present its case in the halls of Congress rather than attempting to pyramid legal authority based on an unstable foundation of ambiguous legislation and distinguishable Supreme Court cases.

III.

Federal Land Located In The State Of Colorado, And The Extent Of State Activity On Said Lands

33.4% of the lands located within the boundaries of the State of Colorado are federally-owned. Their breakdown within the federal hierarchy is as follows:

National Forest and Grasslands (USFS)	20.00%
National Park Land	.90%
Military Enclaves	.50%
Public Domain (BLM)	12.00%
Total Percentage	33.40%

The federally-owned land in Colorado totals 24,269,558 acres out of a total computed land area of 70,465,749 acres. Much of the prime hunting and fishing lands and waters are situated within the boundaries of federally-owned land. Of the elk and deer taken in Colorado during any one year, 80% of the elk and 50% of the deer are killed on federal land. The trout streams and lakes located in these areas are stocked by the people of the State of Colorado from monies collected by the Game, Fish, and Parks Division through the sale of hunting and fishing licenses. Wildlife management studies and projects are conducted by the division on federally-owned lands, and are partially financed from license revenues.

At the behest and with the blessing of the Federal Government, the division's dedicated and understaffed law enforcement section patrols and enforces state game and fish laws on most of the federal lands within Colorado. Again, the cost of law enforcement is born by the license holders.

As an indication of the magnitude of the state's responsibility with respect to the regulation and management of wildlife related functions in Colorado, we cite to the Court the following figures showing the number of game, fish, and related licenses issued in the year 1968:

Hunting	415,329
Fishing	464,843
Total Licenses	880,172

Total revenue in 1968 derived from the sale of such licenses was $10,040,387. These figures should be compared with 1935 when 90,829 licenes were sold and the revenue derived therefrom was $217,849.00. The 1969 figures show an increase in all categories.

It is clear from the above information that game and fish related recreational activities is big business in Colorado. Of the 880,172 licenses sold in 1968, 231,133 were purchased by nonresidents. The State of Colorado is a paradise for the outdoorsman, attracting nonresident hunters, fishermen, and other outdoor enthusiasts by the thousands. Colorado's tourist and resort business, due largely to its hunting and fishing possibilities, is one of the largest industries in the state.

IV.

Conclusion

We of the State of Colorado believe that issues raised in the instant cause are of great importance to every state wherein federally-owned lands are situated. If the Federal Government is allowed to make continued encroachments upon the States' historic right to manage and regulate resident species of wildlife, then, it is logically

to be expected, state game and fish laws, including licensing requirements, will be disregarded with impunity by the public. The jurisdictional foundation upon which states promulgate and enforce game and fish laws will be destroyed. Numerous state conservation agencies will have to close their doors. Management of many great hunting and fishing areas in this country will fall to those less able to meet the obligations of this vital trust responsibility.

The State of Colorado respectfully requests this Honorable Court to grant certiorari in this cause.

Respectfully submitted,

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